IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 884 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM N. MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAMANTBHAI NANABHAI PARMAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,
MS RV ACHARYA for Appellant(s) : 1,
MR HM PRACHHAK, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM N. MEHTA

Date : 29/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant is the original accused who came to be tried by learned Additional Sessions Judge, Kheda, Camping at Anand in Sessions Case No.198 of 1994 and came to be convicted for the offence of murder of his wife Kailasben by judgment and order dated 26th July, 1999. He was sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo S.I. for three months. He was given benefit of set-off.

2. The facts of the case, in brief, are that the appellant was working as a driver with Gujarat Electricity Board and was stationed at Thermal Power Station at Vanakbori in Kheda district. He was allotted a quarter in the colony where he was staying with his wife Kailasben. It is alleged that there were some disputes between the spouses and that the appellant suspected the fidelity of the deceased and did not like her. On the day of the incident i.e. on 6th March, 1994, around 1.00 p.m., while the deceased was at home, the appellant is alleged to have poured kerosene over her and set her to fire. She raised shouts and came to be rescued. She was initially taken to the Medical Centre at the G.E.B. Thermal Power Station Hospital at Vanakbori, was given primary treatment and then was referred to Shree Krishna Hospital and Medical Research Centre at Karamsad. When she was initially taken to the

Thermal Power Station Hospital, she gave history to the doctor of having been burnt by husband by sprinkling kerosene which came to be recorded in the medical case paper. On being taken to Shree Krishna Hospital at Karamsad, she again gave history of homicidal burns by her husband which again came to be recorded by the doctor in the case papers. She was admitted to the hospital and was given treatment. The medical case papers show that her condition was steady till 10th March, 1994, the day on which she expired. While she was at the hospital, the police arrived and recorded her F.I.R. In the F.I.R. also, she implicated her husband – the appellant. A yadi was sent to Executive Magistrate on 6th March, 1994 summoning him to record the dying declaration of the deceased. Pursuant to the yadi, the Executive Magistrate went to the hospital and recorded the dying declaration on 7th March, 1994 in the evening at 1710 hours. In the said dying declaration, the deceased has changed her version and stated that she has sustained suicidal burns. On basis of the F.I.R., offence was registered and investigation made. The panchnama of place of incident was drawn, the accused was arrested and arrest panchnama was also drawn. On death of the deceased, inquest panchnama was drawn, post-mortem was got performed and ultimately, the Investigating Officer, having found sufficient material against the accused – appellant, filed chargesheet in the court of learned J.M.F.C., Dakor. Learned J.M.F.C., Dakor committed the case to the Court of Sessions as the offence was

triable by the Court of Sessions exclusively and Sessions Case No.198 of 1994 came to be registered.

2.1 Charge was framed against the accused – appellant at Exh.2 and the accused pleaded not guilty to the charge and claimed to be tried. The prosecution led evidence. The Trial Court recorded statement of the accused under Section 313 of CrPC explaining circumstances against him where the accused took the defense of denial and pleaded that he is innocent and that he has been framed up. The Trial Court, after considering the evidence led by the prosecution, came to the conclusion that the prosecution was successful in establishing the charge against the accused and convicted him for the offence of murder of his wife Kailasben by judgment and order dated 26th July, 1999 which is impugned herein.

3. Learned advocate Ms. Acharya appearing for the appellant submitted that the prosecution has led two sets of evidence, one set of evidence implicates the appellant whereas the other exculpates the appellant. The first set which implicates the appellant is in the form of dying declarations recorded by the doctors at Vanakbori and Karamsad in the form of case history given to them by the deceased and the F.I.R. recorded by the Investigating Officer. Counterweighing this is the other set of evidence in the form of dying declaration made by the deceased before Executive Magistrate which totally exculpates the appellant as the deceased stated that

she sustained suicidal burns. It was submitted that there is no reason to doubt or disbelieve the dying declaration made before the Executive Magistrate which is done by an independent person. There is no flaw in the procedure adopted by the Executive Magistrate and there is no reason to doubt the genuineness of what is recorded by him. It was also contended that there is no evidence to show as to what was the mental state of the deceased when she gave history to the doctors, as is alleged. So also, there is no evidence about her condition when the F.I.R. was recorded whereas the dying declaration before the Executive Magistrate carries a counter-signature of the doctor who was present when the dying declaration was recorded. It was, therefore, contended that the prosecution case suffers from serious defects and the Trial Court was at error in concluding that the case was proved beyond reasonable doubt. It was, therefore, submitted that the appeal may be allowed and conviction recorded by the Trial Court by the impugned judgment may be set aside.

4. Learned APP Mr. Prachhak has opposed this appeal. According to him, the dying declarations made before the doctors are recorded by independent persons whose version is supported by contemporaneous record maintained by the hospital. It was submitted that the F.I.R. is also recorded by a police officer which is consistent with the version given by the deceased to the doctors. The version that is given to the doctors and in the F.I.R. is first in point of

time and should be given greater weightage. It was also contended that the dying declaration recorded by the Executive Magistrate, undoubtedly, is recorded by an independent officer but significantly, though the yadi was received by the Executive Magistrate in the evening on 6th March, 1994, the dying declaration is recorded in the evening on 7th March, 1994 i.e. after about 24 hours. Why and under what circumstance there is a shift in the version of the deceased is a puzzle but the fact remains that initially the deceased implicated the appellant. Mr. Prachhak submitted that the contemporaneous record of the hospitals indicated that the deceased was conscious, co-operative and oriented around the time when she gave history to the doctors and when her F.I.R. was recorded. The doctor who has put his initials on the dying declaration was not available and, therefore, his signature came to be proved through another doctor. It was also submitted by Mr. Prachhak that when the dying declaration was recorded, sister of the deceased - Harkhaben was present, as can be seen from the dying declaration itself. The thumb impression recorded on the dying declaration by the Executive Magistrate is very faint and is not identified by anyone. Mr. Prachhak also submitted that when the accused was arrested, there were marks of injury on his person and indications of violence. His shirt was torn and there were nail marks on his face and other parts of the body. The panchnama of the place of incident also indicates that the deceased must have resisted the act of the appellant.

Broken pieces of bangles are found at the place of incident. These ..... circumstances would show that the version recorded in the dying declaration about suicidal burns is doubtful. Mr. Prachhak submitted that the dying declaration indicates that the appellant was present in the house when the incident occurred. This aspect has not been challenged and, therefore, when the incident occurred, only the deceased and the appellant were present in the house. Mr. Prachhak, therefore, submitted that the Trial Court has recorded conviction after recording all relevant factors and, therefore, the appeal may be dismissed.

5. We have gone through the record and proceedings and have examined the same in light of what is canvassed before us. Significantly, we notice that Laxman Galabhai, brother of the deceased, Chanchalben Galabhai, mother of the deceased, Harkhaben Kanubhai, sister of the deceased and Sajjanben Laxmanbhai who is sister-in-law of the deceased have all turned hostile to the prosecution case. Neighbour Isubkhan Ahmedkhan Pathan (Exh.9) has also not supported the prosecution case. Dr. Kirtimalini Ravsaheb (Exh.10) was the lady Medical Officer at the Vanakbori Hospital. She has stated in her deposition that on 6th March, 1994, the deceased was brought to the hospital without police yadi. She was given treatment. She gave history of burns by husband by sprinkling kerosene. She was fully conscious and used to give proper reply to the

questions put to her. She had sustained burns to the extent of 80%. She was referred to Karamsad Medical College. She has produced the medical case papers at Exh.34, so also the certificate (Exh.33). She says that the police had recorded statement of deceased Kailasben. At that time, she was in pain but was fully conscious and was able to give correct replies. She says that Mark 6/1 (Exh.37) was recorded in her presence and she had put her endorsement thereunder to the effect that statement was recorded before her and that the patient was conscious. During cross-examination, she has stated that 80% burns are considered of serious nature. She does not agree to the proposition that in such cases the patient would become unconscious. She denies that the deceased was unconscious when she was brought. She also denies that because she was unconscious, she immediately referred her to other hospital.

5.1 Medical certificate (Exh.33) does not refer to the history given by the patient to the doctor but Exh.34 does indicate that the deceased gave history which is recorded thus:- “H/O Burns by husband by sprinkling kerosene”. The medical case paper is of Kailasben which is maintained in ordinary course of business and it has been maintained since 1991. This aspect is explained by the doctor on being questioned by the court. This would add additional strength to the reliability aspect of the medical case papers.

5.2 Nijamuddin Gulamrasool Saiyed (Exh.36) is

the P.S.I. who recorded the F.I.R. He has proved the contents of the F.I.R. (Exh.37). He stated that when he recorded the F.I.R., Kailasben was fully conscious. The witness has been cross-examined but not a single question is put to him on the aspect of recording of F.I.R. The F.I.R. is at Exh.37 which will have now to be treated as a dying declaration. It appears that it is signed by the deceased and countersigned by the doctor – Kirtimalini Ravsaheb.

5.3 Dr. Jigisha Tribhovanbhai Patel is examined at Exh.17. She is working as tutor with the Karamsad Pramukhswami Medical College. On 11th March, 1994, she was in the Casualty Department and she had performed the post-mortem. She states that the deceased had sustained severe burns and she died of Septicaemic shock. She says that she has prepared the post-mortem notes (Exh.19) and had issued certificate as to the cause of death. This witness was recalled by virtue of an order of the court passed below Exh.41. She states that the deceased was brought to Karamsad Hospital on 6th March, 1994 at about 0720 hours. At that time, Dr. Siddharth Shah was on duty who has now migrated to America. She says that she can identify the handwriting of Dr. Siddharth because they were serving together. She identifies the handwriting of Dr. Siddharth on medical case papers (Exh.42). She has been cross-examined again by the learned advocate for the accused and states that the blood pressure of the

deceased was normal on 7th but she denies that the patient would be conscious in all cases where blood pressure is normal. She admits that she had not given any treatment to the deceased.

6. Rameshchandra Chimanlal Mehta, examined at Exh.12, is the Mamaltdar who had recorded the dying declaration. According to him, he received a yadi from Vidyanagar police on 7th April, 1994 (it has to be 7th March, 1994). He produced that yadi at Exh.13. That yadi is dated 6th March, 1994. On basis of that yadi, he went to the hospital, got in touch with the Medical Officer and confirmed that Kailasben was conscious and, thereafter, he recorded her statement. He states that Kailasben stated before him that she had herself poured kerosene on herself and set herself to fire. Her husband was in another room; that her husband, on learning, came, threw a quilt over her, thereafter, the neighbours have brought her to the hospital at Karamsad. He says that he took thumb impression of Kailasben on the dying declaration. He also says that the doctor also signed before him. There is no cross-examination of this witness by the defense. On perusal of Exh.14, we find that when the dying declaration was recorded, Harkhaben, sister of the deceased was present. We also notice that the thumb mark which is appearing on the dying declaration purporting to be that of the deceased has not been identified as such by anyone. There is overwriting on time aspect.

7. What we have before us now are two dying declarations in form of case history given to the doctors at Vanakbori and Karamsad. Both the doctors have stated that the deceased gave them the history of having sustained burns at the hands of the husband. This oral version of the doctors is supported by contemporaneous material in form of medical case papers prepared and maintained by the hospital in ordinary course of their business. These doctors are independent persons and have no reason to have any bias for or against either the victim or the accused.

7.1 We also have the F.I.R. recorded by the police officer. This F.I.R. also implicates the accused – appellant and it is alleged that he poured kerosene and set the deceased to fire. The officer who recorded this F.I.R. has deposed to this effect and that aspect has not been challenged during cross-examination. The witness has stated that the deceased was conscious when her statement was recorded. This version gets support from deposition of the doctor who also says that the deceased was conscious when her statement was recorded by the police and version of both these witnesses gets support by endorsement made by the doctor below the F.I.R. This F.I.R. is signed by the deceased in presence of these two witnesses to which effect they have deposed.

7.2 Thus, the above material emerges first in point of time which implicates the accused and is supported by evidence of independent witnesses and contemporaneous material maintained by them.

8. Against the above evidence, we have evidence in the form of deposition of the Executive Magistrate and the dying declaration recorded by him. We notice that the yadi which was sent to the Executive Magistrate is dated 6th March, 1994. The Executive Magistrate states that he received the same on 7th March, 1994. We find some force in his say as there is an endorsement made by him in the margin on Exh.13 indicating the date and time. He has received a yadi on 7th March, 1994 at 9.35 a.m. However, the dying declaration seems to have been recorded on 7th March, 1994 at 7.10 p.m. This dying declaration gives a total go by to the earlier version of the deceased and indicates that the deceased sustained suicidal burns. It is clear from the dying declaration that when this dying declaration was recorded, sister of the deceased was present. This dying declaration is recorded at a later point of time. It is recorded therein that both the thumbs and toes are burnt and, therefore, it is not possible to take thumb impression. And after writing this, curiously, a thumb impression is claimed to have been taken by the Executive Magistrate!! The Executive Magistrate has also deposed to the effect that he had obtained thumb impression. The dying declaration recorded by the Executive Magistrate, therefore, suffers from various

defects rendering it unreliable. On one hand, it is recorded therein that both the thumbs are burnt and it is not possible to have thumb impression whereas thumb impression is taken on the dying declaration (Exh.14) and the Executive Magistrate also states that he has obtained thumb impression. Secondly, the thumb impression is not identified by anyone. The thumb impression is very faint. The doctor whose signature appears to have been obtained on the dying declaration is not available. The time gap between receipt of the yadi and recording of the dying declaration is also significantly big. We are not able to reconcile how a different version is coming in the dying declaration but the fact remains that the dying declaration before the Executive Magistrate does not inspire any confidence. Contrary to that, we find no reason to doubt the evidence in form of case history recorded by the doctors in medical case papers so also the F.I.R. implicating the accused.

8.1 It is also relevant to note that when the accused was arrested, he was wearing clothes which were recently torned. There were nail injury marks on his face and other parts of the body which would show that there was resistance from the deceased. His clothes and hands were smelling of kerosene.

8.1.1. There is yet another circumstance showing violence and involvement of the appellant. Indications of violence are recorded in the panchnama of the place of incident. Broken pieces of bangles

are found scattered at the place of incident.

9. In our opinion, therefore, though we have two sets of evidence, the evidence in form of dying declaration which is favourable to the accused does not merit acceptance. It does not inspire any confidence whereas the other set of evidence implicating the accused is more weighty, more trustworthy, more authentic and reliable.

9.1 The evidence favourable to the accused/appellant is in form of dying declaration recorded by the Executive Magistrate. Law on dying declaration is well-settled that it is like any other piece of evidence. Since the maker is not available to be tested on touch-stone of cross-examination, a close scrutiny to such evidence has to be given while assessing its evidential value. Probability test has to be applied to such evidence before accepting it as true and trustworthy. For doing so, court may not always look for corroboration but surrounding circumstances have to be examined. And then, it dying declaration is found trustworthy, the same may be accepted. Reference may be had to:

(1)1999 (2) GLH 842 - Koli Chunilal Savji & Anr. vs. State of Gujarat
(2)1999 (2) GLH 859 - Koli Chunilal Savji & Anr. vs. State of Gujarat

(3)(2002) 6 SCC 710 - Laxman vs. State of Maharashtra

(4)(2002) 8 SCC 83 - Rambai vs. State of Chhatisgarh

9.2 We do not find any reason to interfere with the reasonings adopted and conclusions arrived at by the Trial Court. The appeal merits rejection.

10. The appeal stands dismissed. The judgment and order dated 26th July, 1999 rendered by learned Additional Sessions Judge, Kheda, Camping at Anand in Sessions Case No.198 of 1994 stands confirmed.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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